

Guilty of Homelessness – The Resurgence of Penal Populism in Hungary

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The judge opens the hearing in the case of Mrs. Oláh, a 62-year-old homeless woman who is charged with committing the misdemeanor of “residing in public spaces as habitual dwelling”. Everybody, but the defendant herself is allowed to be in the courtroom. Held in another location, she is able to communicate with the judge and her counsels only via video conference equipment. Mrs. Oláh starts her testimony with a short account of her life. After having left school, she worked as a stenographer in the Ministry of Interior, and later as an assistant. In 1995 she tried her luck in the United States, but she returned to Hungary shortly thereafter. For several years, she made her living by cleaning houses, living together with her partner. However, after he passed away, her partner’s family forced her to leave their shared abode.

Having nowhere else to go, in the beginning, she travelled day and night on the tram. Then she decided to stay at a temporary shelter for homeless people, but the circumstances were so horrible that she returned to the neighborhood where she used to live and settled on a bench. Many residents from the area were kind to her; they brought her food and clothes. Despite her deplorable situation, she was not completely hopeless: she was in the middle of a law suit over her claim to the apartment and she would soon be eligible for a pension. She thought about her homelessness as a temporary situation.

“Even though she does not intend to pursue a homeless lifestyle, this fact does not exclude her responsibility.” – [said](#) the prosecutor at the hearing. The judge agreed and consequently found the defendant guilty. This time Mrs. Oláh was given a warning only, but was told that if she continued to “maintain” her homeless lifestyle, she would soon find herself behind bars.

The law strikes down

After the adoption of the Fundamental Law in 2011, Prime Minister Viktor Orbán [said](#) that the new constitution was carved in granite to serve as a solid basis of the Hungarian political system. It appears that the Hungarian granite is pretty malleable, because the Fundamental Law was modified this June, for the seventh time by the governing majority. Section XXII – as modified by the [Seventh Amendment](#) – provides that living in public places on a permanent basis is prohibited, thereby providing a clear constitutional basis for the [criminalization of homelessness](#). This legislative measure was fiercely criticized by Hungarian NGOs (such as the [Hungarian Civil Liberties Union](#), the [Hungarian Helsinki Committee](#) or the [City is](#)

[for All](#)), and by international organizations as well. For example, Ms Leilani Farha, the [UN Special Rapporteur on adequate housing](#), [called](#) the amendment “absolutely unacceptable”. It does not only violate the right to adequate housing, but may also constitute cruel, inhuman and degrading treatment.

It seems that Ms. Farha’s concerns did not cause sleepless nights for the Hungarian government, that soon introduced in Parliament a bill [amending](#) the Act on Misdemeanors. According to the new provisions, “residing in public spaces as habitual dwelling” constitutes a petty offence punishable by community service work or confinement. Section 178/B of the Act on Misdemeanors provides that proceedings need not to be initiated against the homeless person if said person is willing to leave the “scene of the offence”. However, if the same person receives three warnings within 90 days, the initiation of the proceedings is mandatory. Since the rule is not clear enough, it gives room for arbitrary interpretation. The very first person who was [found guilty](#) of committing this petty offence, for example, had been warned by the police officers at 19:45, 21:30 and 22:24 on October 16, and was arrested the next day.

The law stipulates that in case a proceedings is initiated against a homeless person, the latter has to be placed under short term arrest. Personal belongings are confiscated and stored by the police for a maximum period of six months. The judge has to render a judgment in the case within 72 hours from the time of arrest. For the first two times, the perpetrator may receive a simple warning from the court or be ordered to perform community service work. However, incarceration is mandatory for the third conviction.

Resistance

Unlike the British or the French who are ready to paralyze the life of the whole country if they do not agree with a political decision, Hungarian demonstrations even in the midst of serious political scandals remain usually quite peaceful. And by peaceful, I mean weak and boring. However, there seems to be a relatively strong resistance to the criminalization of homelessness. Nay, the defenestration of the government is not hanging in the air, but professional organizations have taken some tentative steps at least. As of today more than 3000 lawyers signed a [petition](#) standing up against the legislation, but similar petitions were written by [social workers](#), [medical doctors](#) and [contemporary artists](#) as well. A wonderful group of talented young attorneys, called [Streetlawyer Association](#), provides free legal assistance to homeless people, providing information, giving advice and representing them in their cases. The association [requested](#) the Human Rights Commissioner (Ombudsman) to initiate proceedings before the Constitutional Court, challenging the constitutionality of the new act on the ground that it violates fundamental rights.

Also, some of the ordinary judges show willingness to torpedo the legislation. The district court of Pécs [terminated](#) the proceedings in the case of a homeless person, on the basis that he did have some sort of temporary accommodation, therefore one of the constitutive elements of the offence was missing. On the same day, the district

court of Kaposvár [suspended](#) the proceedings and turned to the Constitutional Court requesting for a constitutionality review of the newly adopted law. The district court of Székesfehérvár soon [followed](#) this example.

Chances of success

Hence, the cases mentioned are pending before the Constitutional Court at the moment. Even though the law criminalizing homelessness clearly constitutes a violation of human rights, and we can see some promising signs of resistance, it is far from being certain that the Constitutional Court will strike down the act. Fortune telling may be more reliable here than any professional prediction.

The Hungarian Government [first attempted](#) to apply criminal law measures against homeless people in 2012, but the Constitutional Court in its Decision no. 38/2012 abolished the respective provisions, stating that criminalizing the status of homelessness is unconstitutional, since it violates human dignity. The governing majority did not wait long to counter-attack and adopted the Fourth Amendment to the Fundamental Law in 2013 which modified [section XXII](#) as follows:

“In order to protect public order, public safety, public health and cultural artefacts, an Act or a local government decree may, with respect to a specific part of public space, provide that using a public space as a habitual dwelling shall be illegal.”

[Subsequent legislative](#) measures followed the adoption of the Fourth Amendment. However, the new provisions were not systematically enforced by the police, and appeared to remain as symbolic measures. It is not clear why the Hungarian government decided to launch a new attack on homeless people, but the fact is that the Seventh Amendment and the new provisions of the Act on Misdemeanors constitute a much clearer and stronger legal basis of the criminalization of homelessness. However, the case is not lost yet. The [unconstitutionality of the law](#) can be argued on several grounds, as follows.

Firstly, it needs to be stressed that the newly amended section XXII of the Fundamental Law does not necessarily make the criminalization of homelessness constitutional. The provision only states that “living in public places on a permanent basis is prohibited”, but criminal law measures are not specifically mentioned.

Secondly, the regulation goes against the rule of law principle, because the criminalized behavior is not “harmful to society” (which is a constitutive element of petty offences in Hungarian law) and the law allows for arbitrary application.

Thirdly, the law violates the right to human dignity because by making homelessness punishable, the regulation, in fact, criminalizes a status, not a behavior.

Fourthly, the regulation severely restricts the assessment of the police officers and the judges when it prescribes the mandatory application of certain measures and punishments, which is not compatible with the constitutional requirements of criminal law.

Fifthly, the mandatory placement of defendant(s) under short term arrest unreasonably limits their personal freedom.

Sixthly, the application of the new law will inevitably lead to an official criminal register of homeless people, which violates the right to protection of personal information.

Seventhly, the confiscation, and the subsequent destruction, of the defendants' personal belongings constitute a breach of their right to property.

Finally, the procedural rules do not satisfy the requirements of the right to a fair trial and the right to an effective remedy.

All eyes on the Constitutional Court

In light of all these reasons, one would reasonably expect the Constitutional Court to find the law unconstitutional. However, over the years, not only has the text of the Fundamental Law been amended, but the composition of the Constitutional Court has also changed. At the moment, the vast majority of the judges (11 out of 15) have been nominated and elected exclusively by the governing majority. Several academic analyses (see for example Bernadette [Somody](#), Zoltán [Szente](#) in English, Gábor [Halmi](#)) have come to the conclusion that the political attacks on the Constitutional Court definitely had an impact on its jurisprudence. The court has become very deferential to the governing majority, and – according to [András Jakab](#), the former head of the Institute for Legal Studies of the Hungarian Academy – the judges are not willing to, or do not dare make, the right decisions based on professional grounds.

This is why it is of utmost importance to exert pressure on the Constitutional Court, and send an unequivocal message that even in a hostile political environment, judges must never abdicate their primary responsibility as protectors of the rights of the people. Political considerations cannot prevail over professional requirements under any circumstances. Therefore, I encourage every member of academia, and Hungarian, foreign and international human rights organizations to send amici curiae to the Constitutional Court, and urge the judges to defend the rights of homeless people from the populist rage of the Hungarian government.

